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Supreme Court of the United States

OCTOBER TERM, 19

No. 98

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

METROPOLITAN LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

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BRIEF FOR RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

Question Presented

Did the National Labor Relations Board, in violation of Section 9(c)(5) of the National Labor Relations Act, as amended, "make the extent to which the employees have organized . . . controlling" when it found a single district office an appropriate bargaining unit?

The Board's brief presents the question quite differently and, in our view, inaccurately. It includes the unwarranted and unsupported assertion that the Board's decision was "concededly proper on the reasons given by the agency". Who made the concession and when it was made is nowhere disclosed. The fact is that no such concession was ever

made either by respondent or by the court below, which felt "seriously handicapped in this case by the Board's failure to articulate specific reasons for its unit determination" (327 F. 2d at 909). Respondent has contended throughout this litigation that the Board's decision was improper and inconsistent with its own established criteria for the determination of an appropriate bargaining unit.

Statement

1.

Section 9(c)(5), first inserted in the National Labor Relations Act in 1947, prohibits the National Labor Relations Board, in its determination of an appropriate bargaining unit, from treating as "controlling" the extent to which the affected employees have been organized.

Before the enactment of Section 9(c)(5)—from the early days of the Board's existence and continuously until 1944—the Board had often certified single district office and city-wide units in the insurance business, as well as similarly fragmented units in other industries, repeatedly acknowledging as its purpose the acceleration of organizational efforts by labor unions. Extent of organization was thus often avowedly treated as controlling. Section 9(c)(5) was enacted for the express purpose of outlawing "a practice of the Board by which it has set up as units appropriat for bargaining whatever group or groups the petitioning union has organized at the time."[1]

[1] House Labor Committee Report, H. Rep. No. 245, 80th Cong., 1st Sess., 37-38, 1 Leg. Hist. 328.

2.

Thus, until 1944, the Board had uniformly found single district insurance office units appropriate, but solely and frankly on the basis of the unions' extent of organization. Then, for a period of seventeen years, the Board consistently found such units inappropriate, holding, in several post-1947 cases, that Section 9(c)(5) applied and precluded such a unit. In 1961 the Board, by a bare majority and for the first time in its history, found appropriate as a bargaining unit a single district insurance office for purported "reasons" other than extent of organization. *Quaker City Life Insurance Co.*, 134 NLRB 960 (1961).

Following *Quaker City*, the same Board majority has in this case, and in a series of companion cases certified a veritable hodge-podge of units, consistent only in the respect that each unit is the one demanded by the union and each is exactly co-extensive with the extent to which the employees have been organized.

In this case the Board majority held that a single Metropolitan district office in Woonsocket, Rhode Island (one of eight such offices operated by the Company in metropolitan Providence and of more than 1,000 in the United States) was an appropriate unit. The Union had attempted to organize all eight of the Company's district offices in metropolitan Providence. When that effort failed, the Union limited its petition to the single district office it had successfully organized. The Board's justification for non-inclusion of the other offices was that the nearest one was 12 miles away. Yet, in the companion cases the Board did not hesitate to include in one unit district offices as far as 30 miles away and "detached offices" in other states and as far as 284 miles from the district office.

Extent of organization, while sharply brought to the attention of the Board in each of these cases, and repeatedly mentioned and relied upon in the dissents of the two-member minority, was not mentioned by the Board majority in this case or in any of the companion cases.

The Board argues here that in finding that this one district office was "a separate administrative entity" and in excluding from the unit a district office twelve miles away, it did nothing more than apply its traditional and established criteria. Yet all the facts with respect to the administrative structure of the Company, the centralization of its operations, and the uniformity of the wages, benefits, hours and working conditions of its employees were identical in every material particular with the facts that repeatedly came before the Board before 1961 when the Board was repeatedly holding that a single district office was inappropriate except on the basis of extent of organization.

Even more revealing of the Board's principal reliance on extent of organization is the irrational pattern of unit determinations in companion cases.

The Board has in these cases certified a unit consisting of two out of a total of three offices in the State of Delaware; a unit comprising the entire metropolitan area of Detroit, including both urban and suburban offices; a smaller urban and suburban combination of offices in Cleveland; a unit consisting of 33 offices within the political city limits of Chicago, but excluding 14 offices in suburban Chicago, although a number of the city offices administer territories extending into Chicago suburbs and a number of the suburban offices administer territories extending into the city proper; a single district office in Sioux City, Iowa, together with two detached offices in Fargo, North Dakota and Sioux Falls, South Dakota—respectively 284 and 120 miles away

from Sioux City; and has found consistent with Board policy a unit consisting of the entire State of Massachusetts.

In each of these cases the Board majority has attempted a rationalization, always avoiding any mention of extent of organization. In each, the rationale is varied to support the particular facts. In each, the union obtains a determination that the appropriate unit is exactly the one it has requested. In each, the unit is precisely coincident with the extent to which the union has organized the employees. The combinations shift without pattern except that one thread runs through them all—extent of organization.

The court of appeals, looking at what the Board actually had done in these cases and acknowledging that it was disregarding what the Board majority had said and failed to say, could find no rational basis for these varying unit determinations by application of the Board's traditional or established criteria. It therefore concluded that the two-member Board minority had been right in finding that the majority had "indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of Section 9(c)(5) of the Act."[2]

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[2] In two companion cases, *Metropolitan Life Insurance Co. (Wilmington)* v. *N. L. R. B.*, 328 F. 2d 820, decided by the Third Circuit the day after the decision below, and *Metropolitan Life Insurance Co. (Cleveland)* v. *N. L. R. B.*, 330 F. 2d 62 (6th Cir.), both pending on petitions for writs of certiorari, No. 56 and No. 229 respectively, this Term, the courts reached contrary conclusions but in each instance decided the case as though it was an isolated one and without acknowledgment that in all other cases a rationale was always found by the Board to justify as appropriate the unit requested and the one exactly coincident with extent of organization. In both cases the courts accepted the Board's assertions that it was doing nothing more than applying its normal unit criteria when this was not so. (See Board Brief to Third Circuit, pp. 8-11, 30-31; Board Brief to Sixth Circuit, pp. 9-14, 33.)

3.

The Company does a nation-wide business through 1000 district offices (R. 284a), is administered from its home office in New York City (R. 38a-40a, 284a-285a) where business policy is formulated and from where it is uniformly applied (R. 53a-54a). For this purpose the Company is divided into fourteen territories each headed and supervised by a Superintendent of Agencies (R. 39a-42a). Rhode Island is part of the New England territory and contains eight district offices, all located in metropolitan Providence (R. 46a-47a, 177a, 189a).

Each district office is managed by a district manager whose functions and authority are severely limited. The supervisory officer is the Superintendent of Agencies in whom the only effective control and authority over district office operation is vested. While the manager maintains contact with the agents working out of his office, he has no authority to alter any of the Company's sales materials or the content of the educational meetings he conducts for the agents each Friday morning at the direction of the home office (R. 40a-43a, 116a-119a, 129a-132a, 144a-147a, 168a). Nor has he any authority to hire or fire agents or even clerks (R. 55a-56a, 117a). While he is encouraged to recommend new hires of agents, in practice one of every four of his recommendations has met with rejection (R. 55a, 179a).

He does not train his new agents. They are given instruction by home office representatives and when their course is completed the assistant district manager gives the new agent on-the-job training as prescribed in minute detail in Company training manuals (R. 56a, 219a-225a).

The district manager has no authority to dismiss or even to suspend any agent; only the Superintendent of Agencies has such authority (R. 57a-58a). In practice, in the New England territory, half the recommendations for

dismissal made by the district managers in 1961 were rejected by the Superintendent of Agencies (R. 57a, 179a). The district manager may not handle a grievance or even discuss one with an agent. Such grievances are filed with the Superintendent of Agencies in the first instance (R. 62a-63a). District managers play no role whatever in collective bargaining negotiations which have always been conducted by a committee consisting of the Superintendent of Agencies and other home office personnel (R. 61a-62a). The Company compensation plan and all employee benefit programs including vacations and leaves of absence are uniform throughout the nation and no district manager has any authority in any of these areas (R. 58a-59a, 66a-67a, 146a).

Despite this evidence, common to every insurance agent representation case decided by the Board in its entire history, the Board here purported to find "that each of Employer's individual district offices was in effect a separate administrative entity through which the Employer conducted its business operations, and therefore was inherently appropriate for purposes of collective bargaining" (R. 15a, note 2). That this was no more than *ad hoc* fiat will be demonstrated in Point II, *infra* (pp. 30-40). In fact, the district manager in this case had no greater function or authority than the Board found in any of the pre-1944 cases, typical of which was the case from which we quote in the margin.[3]

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[3] *Metropolitan Life Insurance Co.*, 43 NLRB 962, 966-7, 965 (1942):

> "In the United States the Company has, for administrative purposes, nine agency divisions, called territorial divisions, each representing a group of contiguous States. The State of Wisconsin is located in Territorial Division D, which includes the States of Wisconsin, Minnesota, Michigan, and Illinois. Each division is directly under a superintendent of agencies for that division, who is in turn responsible to the second vice president in charge of agencies. Each superintendent of agents

Historically, the Company has had an active history of collective bargaining. It now has state-wide collective bargaining agreements in Maryland, Minnesota, Missouri, New Jersey, Pennsylvania and Wisconsin. Insurance Workers International Union, AFL-CIO, the petitioning Union in this case, has company-wide, multi-state and many

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is the effective supervisory executive of all the district offices and office account offices in his division. Field training activities are conducted by the field training division which is divided into territorial divisions which correspond exactly with the agency territorial divisions. Each territorial division contains a number of offices of two main types known and referred to as district offices and office account offices, each under the direction of a manager and one or more assistant managers. In no case, however, do authorized agency points served by any district office or office account office include localities in more than one territorial division of the Company.

"All matters of general policy in the operation of the agency divisions of the Company are determined by the directors and officers of the Company at its home office. All applications for policies of insurance are accepted, postponed, or rejected at the home office and all policies are issued at the home office. All fiscal affairs of the Company are under the direct supervision and control of the home office. All investigations are authorized and approved by the home office. All agents are appointed by the Company at its home office, although applications are made at a local office. Preliminary training of the agent is generally done under supervision of the home office. Rates of earnings are determined by directors and officers at the home office and are uniform throughout the United States, for each of the various classes of agents. The forms on which, and the manner in which, the agents make their reports of fiscal transactions to the Company are prescribed, and from time to time changed, by the home office. The work of each agent is checked from time to time by the home office, which alone can adjust or compromise shortages, petty or otherwise, in the accounts of an agent. Managers have no authority to arrange sales drives or sales campaigns, nor have they authority to set quotas for an agent individually or for the office.

"The agent in one district office or office account office in Territorial Division D is in no different position from the agents in another district office or office account office in that division. Those factors which directly affect his work, such as collection, promotions, compensation, working conditions, rules and regulations, supervision, and termination are uniform throughout Territorial Division D. Agents may be and occa-

state-wide collective bargaining units with other insurance companies. The majority of its members are in state-wide or multi-state bargaining units (R. 227a, 328a, 341a).

The eight district offices in Rhode Island are all within metropolitan Providence (R. 189a, 275a, 279a). Working as actively in the other seven district offices as it had in Woonsocket, the Union attempted to organize all the Company's agents in Rhode Island. It sent written material and copies of the Union newspaper to the agents in the other offices, just as it did to those in Woonsocket. Personal contact was also made with agents in another office by an official representative of the Union (R. 28a).

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sionally are transferred to a different office at their own request, or with their consent at the request of the Company" (966-967).

As to local management the Board said (965):

"Regular agents and office account agents usually report to the district offices or office account offices at least 3 days each week, and in addition they are required to report once a week for educational meetings. On the days on which they report to the office they deposit premiums, turn in applications for new policies, and receive their mail and other communications. Among the facilities which the Company furnishes its agents at these offices are desks, mail boxes, stationery and forms, and advertising material, such as literature and calendars. The hours at which the agents report at the office are fixed by the district manager usually with reference to the time that the office is open to the public. Managers may occasionally call agents to the office at other times if they deem it necessary in the interest of service to the policyholders or in connection with other phases of the business. Agents are frequently accompanied on their debits by an assistant manager or representative of the field training division on training assignments in various phases of the business, and occasionally by an assistant manager or a representative of the field auditing division for the purpose of auditing an agent's account. Each agent is entitled in each calendar year to a vacation, the duration of which is determined by the home office and is uniform throughout the United States for all agents having the same length of service."

When the Union failed to organize the entire unit that would have been indisputably appropriate, i.e., the one consisting of the entire State of Rhode Island, it petitioned for the unit that has here been found appropriate.

4.

The pattern of facts revealed by the record in this case is in no material respect different from the pattern established in any one of the representation cases in the insurance business that have come before the Board since its creation. This applies to the pre-1944 cases (see, for example, *Metropolitan Life Insurance Company*, 43 NLRB 962, 966-7, 965 (1942) quoted *supra*, note 3), to the cases decided while the 1944 rule prevailed (see, for example, the 1944 *Metropolitan* case[4] itself), and to *Quaker City Life Insurance Co.*, 134 NLRB 960 (1961) and the cases that have followed it.

Yet in *Quaker City* and thereafter the Board has consistently ignored its own established criteria (the company's administrative structure, highly centralized operations and uniform wages, duties and working conditions), disregarded its former express deference to Section 9(c)(5), and in each instance approved the unit requested by the union which, also in each instance, coincided exactly with extent of organization. This is the course that has resulted in a variety of inconsistent unit determinations described in detail in Point II, *infra*, pp. 36-39.

5.

To test the validity of the Board's unit determination, the Company refused to obey the Board's order to bargain (R. 4a-11a) and petitioned the Court of Appeals for the

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[4] *Metropolitan Life Insurance Co.*, 56 NLRB 1635, 1638 (1944).

First Circuit for an order setting the Board's order aside (R. 360a). Respondent's petition was granted (R. 5-13) and the case is here on the writ of certiorari granted to the Board (—— U. S. ——, 33 U. S. Law Week 3128, October 13, 1964).

Summary of Argument

Section 9(c)(5) imposes restrictions on the otherwise broad discretion of the Board to determine appropriate bargaining units. Its legislative history recognizes that the Board, in earlier cases in which extent of union organization was the decisive factor, sometimes "pretended to find other reasons for its decision." If the statute is to have any meaning or vitality, judicial review of Board action must look behind the reasons asserted by the Board and seek the reality of what the Board has done.

This Court has not hesitated to look through purported justifications of state action, whether attempted "ingeniously or ingenuously" (*Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958)), and determine what in fact has been done by the decision presented for review. A similar approach is required here if judicial review is to be meaningful; otherwise Section 9(c)(5) has been repealed by administrative action.

The court below took this approach by examining the *actions* of the Board majority and by refusing to limit itself to acceptance of the transparent justifications asserted by the Board majority. In the two companion cases in which petitions for writs of certiorari are now pending in this Court, the Third and Sixth Circuits fell into error by blinding themselves to the facts that would have compelled exposure of the true basis of the Board majority's actions.

The Board in this case and in the companion cases arrived at conclusions indistinguishable from those that prevailed in cases decided before 1944 in which it frankly admitted that its decisions were controlled by extent of organization. Section 9(c)(5) outlawed such a basis for the determination of an appropriate bargaining unit and the Board has now tried to reinstate the same result for the same reason, changing the process only by attempting to disguise the reason. The court below stripped away the disguise and compelled obedience not only to the statutory language but to the expressed legislative purpose that extent of organization "should have little weight".

The Board's effort to reconstruct a foundation for its decision in this case by reference to "traditional criteria" fails for the simple reason that the decision in this case did violence to those very criteria. The Board has traditionally included in its appropriate collective bargaining units all employees within the category sought who perform their work within the employer's administrative division or area. Concomitantly the Board has uniformly rejected efforts to reduce the size of the unit to that headed by the lowest ranking supervisor whose function is limited to execution of company policy, centrally determined and closely controlled.

Contrary to the contention made for the first time in the court of appeals, the insurance company district office is not an "analogue to the single manufacturing plant". It has never been so held by the Board either in this or in any other case. In any event, the principles governing unit determinations in manufacturing plants would, if applied here, lead only to the conclusion sought by respondent, i.e., that the single district office was found to be an appropriate unit only by treating extent of organization as controlling.

The geographical coherence doctrine, now being applied by the Board to insurance agent representation cases, is easily exposed as subterfuge. The court below put it quite mildly when it held that this criterion has not been "consistently applied by the Board".

The record of Board decisions shows that, on a purported metropolitan area concept, it included urban and suburban offices in one unit in both Cleveland and in Detroit. In the case of Detroit, the Board reached out thirty miles to include a suburban office and fifty-seven miles to include a detached office. The Board did not hesitate, however, when the Union requested it, to do violence to the metropolitan area concept in Chicago where the unit was limited to urban district offices although district office territories crossed municipal lines at several points and, in one instance, an excluded suburban office was only six city blocks away from an included urban office.

In this connection, the Board achieved ultimate absurdity in its slavish submission to extent of organization when in Sioux City it included in one unit a district office in one state detached offices located in two other states at distances 120 and 284 miles away from the district office. And in this case, the Board majority refused to include in the unit any of the seven other district offices, all located in metropolitan Providence, because the nearest was 12 miles away.

The Board says that the statute can be violated only if its unit determination was based *solely* on the extent of organization "in the absence of other criteria of appropriateness." It seeks thus to avoid the real issue presented: Did the Board majority give controlling weight to extent of organization?

Nothing in the language of the statute or in the legislative history supports the Board's proposition. Congress did not limit its command to a prohibition against making extent of organization the "sole" basis for its decision.

The presence of other valid criteria may, of course, shed some light on the Board's controlling motivation in a particular case. But flagrant disregard of established Board precedent, a commitment to extent of organization factor early in the history of Board action in the insurance industry, and an inconsistent and wholly irrational pattern of decisions in contemporaneous insurance cases, are even more relevant to the resolution of the question of statutory violation.

Once this Court comes to accept the conclusion of the court below that the Board has here treated extent of organization as controlling and has thus flouted the express command of the statute, it will have no occasion to comb through the record to find some other justification for the Board's conclusion in this case.

ARGUMENT

POINT I

The court below correctly discerned that, in defining the bargaining unit, the Board had violated Section 9 (c) (5) of the Act by treating as controlling the extent to which the employees had organized.

Presented here is one of a series of cases decided since 1961 and indistinguishable on any of their material facts from the series of cases decided by the Board up to 1944. The Board arrived at identical results in both groups of cases, the only difference being that in the pre-1944 cases the Board treated extent of organization as controlling and acknowledged that it was doing so, whereas in the series beginning in 1961 it has treated extent of organization as controlling *sub silentio*.

Between the two series there intervened the Congressional mandate which the court below has held to have been violated by the Board in this case. The Board decision itself ignored the statute, not only in deed but also by its omission even to refer to it, notwithstanding that a two-member minority forcefully pointed up the problem. In its brief here, it attempts to supplement that decision by *post hoc* reasoning which, when stripped of its obfuscation, is nothing more than an admission that extent of organization was in fact the factor that controlled its decision, in this case and in the entire current series of cases.

In this point we trace the history of the problem to show that the conclusion arrived at by the court below was inescapable.

1. *Development of the 1944 Metropolitan Insurance Rule.*—Before 1944 it had been acknowledged by the Board that "the ultimately appropriate unit of insurance agents is the company-wide unit; and we have established less comprehensive units *solely on the basis of the limited extent of self-organization among the employees affected.*"[5]

Typical is *Metropolitan Life Insurance Company,* 54 NLRB 585, 588 (January 1944), where the Board said:

> "Upon the basis of the limited *extent of self-organization* among the employees involved, we have found appropriate, in a substantial number of cases, units such as the one here sought by the Union. We believe that these considerations are *controlling* in the instant case and that a unit confined to the Company's District Offices in the St. Louis metropolitan area is presently appropriate." (Emphasis added.)

Later that year, satisfied that organization was then proceeding at a sufficiently rapid pace, the Board changed its policy and announced that thenceforth the smallest appropriate unit would be state-wide. It did so on facts which, so far as administrative organization and method of operation of the Company were concerned, were identical in all material respects with those revealed by the instant record. In establishing its new rule, the Board said (*Metropolitan Life Insurance Co.,* 56 NLRB 1635, 1639 [June 1944]):

> "Based upon the *extent of organization* among employees of an employer, we have frequently found ap-

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[5] Emphasis added. *The Prudential Insurance Company of America,* 49 NLRB 450, 456-7 (1943). To the same effect: *Metropolitan Life Insurance Company,* 54 NLRB 585, 588 (1944); *Supreme Liberty Life Insurance Company,* 32 NLRB 94 (1941); *The Prudential Insurance Company of America,* 46 NLRB 430 (1942); *Home Beneficial Association of Richmond, Va.,* 17 NLRB 1027, 1030 (1939).

> propriate for bargaining purposes small groups of employees with a provision for revision of a unit upon a later showing of prior organization. We believe, however, that the principle upon which we have set up such units is not *controlling* in the instant case."[6]

In an earlier decision, *Metropolitan Life Insurance Company*, 43 NLRB 962, 968 (1942), the Board had found a state-wide unit appropriate because:

> "Insurance agents are licensed by their States. Requirements for a license vary greatly from one State to another. State Insurance Departments exercise varying degrees of supervision over the activities of agents and of companies. The insurance agents of each State are to this extent similarly situated. Furthermore, the feasibility of a Statewide unit is indicated by the fact that the agents of John Hancock Life Insurance Company and the agents of the Prudential Insurance Company in the State of Wisconsin are at present successfully engaged in collective bargaining."

In the period from 1944 continuously until the enactment of Section 9(c)(5) in 1947, the Board consistently refused to find a single district office or a city-wide unit appropriate, often stating as its grounds that such units could be appropriate only on the basis of extent of organization.[7]

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[6] Emphasis added. The quoted language appears in the Board's 1944 opinion immediately preceding the language quoted by it in its present brief to this Court (pp. 22-23). The use of the word "controlling" in juxtaposition with the term "extent of organization" suggests a possible source for the terminology which found its way into Section 9(c)(5).

[7] *Metropolitan Life Insurance Company*, 56 NLRB 1642 (1944); *Washington National Insurance Company*, 57 NLRB 224 (1944); *John Hancock Mutual Life Insurance Company*, 57 NLRB 700 (1944); *The Life Insurance Company of Virginia*, 57 NLRB 279

2. *The enactment of Section 9(c)(5).*—Section 9(c)(5), enacted in 1947, expressly forbids the Board, when making unit determinations, from treating as controlling "the extent to which the employees have organized."

The legislative history of the subsection reveals Congressional awareness of what had theretofore developed in the insurance industry. For example, the House Minority Report written in opposition to the bill had argued that "[i]n many industries, notably *insurance* and similar far-flung enterprises covering many States, organization can proceed only piecemeal and to deny collective bargaining in those areas in which organization has been achieved is to deny it entirely." (Emphasis added.) (House Minority Report No. 245 on H. R. 3020, 80th Cong. 1st Sess., 1 Leg. Hist. 379-380.) Similarly, Senators Morse and Murray, arguing against the enactment, pointed out that this section would make organization in the insurance industry difficult for unions because this industry had previously been organized only on the piecemeal extent-of-organization practice (93 Cong. Rec. 6611, 2 Leg. Hist. 1557; 93 Cong. Rec. 6656, 2 Leg. Hist. 1567).

(1944); *The National Life and Accident Insurance Company*, 57 NLRB 1119 (1944); *The Western and Southern Life Insurance Company*, 57 NLRB 1439 (1944); *The National Life and Accident Insurance Company*, 58 NLRB 439 (1944); *Monumental Life Insurance Company*, 60 NLRB 510 (1945); *The Prudential Insurance Company of America*, 61 NLRB 1289 (1945); *John Hancock Mutual Life Insurance Company*, 62 NLRB 240 (1945); *Monumental Life Insurance Company*, 62 NLRB 1200 (1945); *The Life Insurance Company of Virginia*, 62 NLRB 1444 (1945); *Metropolitan Life Insurance Company*, 64 NLRB 396 (1945); *John Hancock Mutual Life Insurance Company*, 64 NLRB 541 (1945); *Washington National Insurance Co.*, 64 NLRB 929 (1945); *Western and Southern Life Insurance Company*, 65 NLRB 855 (1946); *American National Insurance Company*, 69 NLRB 745 (1946); *Peoples Life Insurance Company*, 72 NLRB 1406 (1947); *Quaker City Life Insurance Company*, 73 NLRB 177 (1947); *The Baltimore Life Insurance Company*, 73 NLRB 848 (1947).

Answering these critics, Senator Taft pointed out that the section "overrules the 'extent of organization' theory sometimes used by the Board" (93 Cong. Rec. 7002, 2 Leg. Hist. 1625).

The Board, said the House Majority Report on the bill, "may take into consideration the extent to which employees have organized, [but] this evidence *should have little weight*, and, * * * is not to be controlling" (emphasis added; House Majority Report No. 245 on H. R. 3020, 80th Cong. 1st Sess., 1 Leg. Hist. 328).

In the same Report, Congress criticized the practice of the Board under which it "pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate. (*Matter of New England Silk Co.*, 11 NLRB 852 (1939); *Matter of Botany Worsted Mills*, 27 NLRB 687 (1940))."

To the same effect is the statement of Senator Taft quoted at pages 13 and 14 of the Board's brief in the present case. Indeed, the sentence containing the language italicized by the Board in its brief especially supports our view. It criticizes the Board, as we do here, for having surrendered its duty to determine appropriate units by using the extent-of-organization theory "to give the union what it desires." There can be no dispute with Senator Taft's proposition that, in a given case, "valid tests" may "justify the finding of a small unit." The short answer to the citation of that language in the Board's brief is that, as the court below found the test which controlled in this case was extent of organization.[9]

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[8] In the respect that the Board, in the *New England Silk* case "pretended" not to be controlled by extent of organization, that case is quite similar to the case at bar. See discussion, *infra*, pp. 24-25.

[9] "We are seriously handicapped in this case by the Board's failure to articulate specific reasons for its unit determination. . . .
(footnote 9 continued on following page)

3. *Board policy from the enactment of Section 9(c)(5) until 1961.*—Since the Board had stopped applying its extent of organization rule to the insurance industry in 1944, Section 9(c)(5) had no immediate impact on that industry. The Board continued to certify as appropriate only statewide units, *Monumental Life Insurance Co.*, 75 NLRB 776 (1948), *Monumental Life Insurance Co.*, 77 NLRB 432 (1948), *The Prudential Insurance Company of America*, 80 NLRB 1583 (1948), *Home Beneficial Life Insurance Co.*, 89 NLRB 392 (1950), *Home Beneficial Life Insurance Co.*, 98 NLRB 1053 (1952), *United Insurance Co.*, 108 NLRB 843 (1954), *Allstate Insurance Company*, 109 NLRB 578 (1954), *Allstate Insurance Company*, 118 NLRB 855 (1957), *The Life Insurance Co. of Virginia*, 123 NLRB 610 (1959).

In the *United Insurance* case, the Board refused to divide Pennsylvania into two bargaining units for agents (one for Philadelphia and one for the rest of Pennsylvania) because the requests for such units "appear to be based solely on the extent of organization, and under Section 9(c)(5) of the Act this factor cannot be given controlling effect" (108 NLRB at 848). It is to be noted that the petition in the *United Insurance* case was dismissed because the union's *requests* were based on extent of organization. In the case at bar as well as in the companion cases on which petitions for writs of certiorari are now pending, it is admitted that the Union's requests were based on extent of organization; the Board denies only that its determination was controlled by that factor.

"... the criterion of location in a separate and distinct geographical area is not a criterion consistently applied by the Board. ..." (327 F. 2d 906, 909).

The court below found first-blush plausibility in the Board's use of the "geographic appropriateness" yardstick, but such plausibility faded, said the court, upon consideration of the Board majority's decisions in other recent *Metropolitan Life* cases (327 F. 2d at 910).

The last of the pre-1961 cases, *The Life Insurance Company of Virginia*, 123 NLRB 610 (1959), is most revealing. There, the Board dismissed a petition for a unit consisting of a single district office because, as is true in the case at bar and in all the cases decided since *Quaker City*, the employer's operations were conducted on a state-by-state basis, working conditions were centrally determined, all agents though recruited locally were hired subject to home office approval, and all enjoyed the same employee benefits. Finding that the unit requested by the union was based upon its extent of organization, the Board dismissed the petition because it was "precluded by Section 9(c)(5) of the Act from according controlling effect to this factor as the petitioner is asking it to do here" (123 NLRB at 612).

Board Member Fanning, in a separate opinion, stated that he did not feel bound to dismiss because of the 1944 rule but concurred because of the inappropriateness of a single district office as a bargaining unit. He said (pp. 614-615):

> "I would apply to units of insurance agents the same criteria of appropriateness the Board applies to units in retail establishments, such as the administrative structure of the Employer's operations, geographical separation, centralization of operations, interchange of personnel, and uniform wages, duties, and working conditions. (See, for example, *Father & Son Shoe Stores, Inc.*, 117 NLRB 1479.)
>
> "In the present case, on the facts detailed in the majority opinion I would find that the unit sought does not conform to an administrative division of the Employer's organization, that the operations are highly centralized, and that the wages, duties, and working

conditions are uniform as far as possible throughout the Employer's organization. Accordingly, I would and do find that a unit limited to Danville, Virginia, is inappropriate."

4. *Reversal of Board policy in the Quaker City case.*— Two years later, giving no reason for the change in his view, Member Fanning joined two other members of the Board to reverse the state-wide rule that had prevailed since 1944. The majority, so constituted, held in *Quaker City Life Insurance Co.*, 134 NLRB 960 (1961), that a single district office unit was appropriate for collective bargaining.[10]

In announcing its new policy, the Board majority expressly acknowledged that it had until then uniformly followed the policy of *Metropolitan Life Insurance Company*, 56 NLRB 1635 (1944). It did not, however, so much as mention extent of organization or the existence of Section 9(c)(5) of the Act.

Indeed, its reasoning in *Quaker City* was entirely inconsistent with that Congressional mandate. For it pointed out that the *Metropolitan Life* rule had been adopted "*solely* in anticipation of broader organization on a company wide or state wide basis, which at that time appeared imminent. As a practical matter, however, such state wide or company wide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents." This, the Board asserted, gave rise to a "valid reason for changing the rule" (134 NLRB at 962).

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[10] Board members Rogers and Leedom dissented in *Quaker City*, seeing "no valid reason for departing from the *Metropolitan Life* rule which the Board adopted in 1944."

This was just another way of saying what Senators Morse and Murray had said in the 1947 congressional debates (*supra*, p. 18) and was an almost explicit flouting of the legislative mandate. In the language of Judge Boreman, dissenting, in *N. L. R. B.* v. *Quaker City Life Insurance Co.*, 319 F. 2d 690, 696 (4th Cir. 1963):

> "It is quite clear that the reason for the Board's decision to change the policy of Metropolitan is that it is easier to organize the small local district offices one at a time and thus eventually spread to a state-wide or company-wide group as a single unit."

Quaker City was followed by *Metropolitan Life Insurance Company*, 138 NLRB 512 (1962). In that case, the Board majority found appropriate a unit consisting of insurance agents employed in nine different district offices located in the Cleveland metropolitan area. No recognition of the Board's duty under Section 9(c)(5) was anywhere acknowledged, although this point was strongly argued. The Board granted the unit requested by the union, stating that it was basing its determination on geographical considerations. Two Board members dissented, adhering to their position in *Quaker City* and holding (p. 516):

> "It seems clear that the only justification for this finding is the geographic location of the offices. We believe this to be no reason for granting this unit. As the majority notes, each of these different district offices operates independently of another, the debit agents in each have separate, immediate supervision, there is no contact among the debit agents of the different offices either on a business or social level. In our view, the debit agents in these different offices do not have a community of interest with respect to the unit sought. Thus the unit which the majority finds appropriate

appears to be based upon the Union's extent of organization of these debit agents."

There have followed scores of Board decisions collected in Appendix A to this brief in which the unit certified was the one requested by the Union and the one marking the limits of the extent to which organization had succeeded. The inconsistency in the "geographic considerations" applied in these cases are discussed elsewhere in this brief (*infra* p. 36) and are there made painfully apparent.

5. *The true rationale of the Board majority in Quaker City.*—There is little to choose between the reasoning of the Board in its pre-1944 decisions in which inappropriate units were established based frankly upon extent of organization, and the reasoning in *Quaker City* and in the instant case. In both of the latter two cases extent of organization is not even mentioned but the unit determination is made so as not "to arrest the organizational development of insurance agents." Both cases are but part of the effort to treat extent of organization as controlling while pretending to find other reasons for the decision in this and the companion cases.

This point can perhaps be best illustrated by reference to a specific case which was before Congress when it was dealing with Section 9(c)(5). It will be recalled that the House Committee cited *Matter of New England Silk Co.*, 11 NLRB 852 (1939), as an example of a case in which the Board "pretends to find reasons other than the extent to which the employees have organized" for holding units to be appropriate. In that case, as in this one, the Board found appropriate separate units when the plants involved were only seven miles apart, matters of policy were determined in the executive offices of the company, payroll records

were made up in the executive offices, working conditions were uniform and fixed in the central office of the company, each plant had its own superintendent and hired its own help, and there was no social intermingling between plants.

The express Congressional disapproval of the Board's holding in *New England Silk* is the clearest expression that Section 9(c)(5) was intended to divest the Board of power to find appropriate a unit such as the one approved in the present case, in which the Board found that the Company's "policies and procedures are established at the home office"; the Superintendent of Agencies "has the responsibility for seeing that the offices in his territory operate in accordance with these company directions"; all "labor relations policies are established at the home office and all agents are subject to the same wage policies, employee benefits and working conditions" (138 NLRB at 566, 567). The Board majority's statement that the district manager exercises a degree of supervision of his office, is even less cogent than the finding in *New England Silk* that each plant had its own superintendent and hired its own help.

6. *The basis for the refusal of the court below to enforce the Board's order.*—The court of appeals in its opinion traced the history of Board decisions in insurance agent representation cases and found that the "Board's policy for determining appropriate bargaining units of debit insurance agents has not been consistent over the years" (327 F. 2d at 907). It contrasted the 1944 *Metropolitan Life* decision (56 NLRB 1635) with the 1961 decision in *Quaker City* (134 NLRB 960) in which the Board had announced, as the sole reason for overruling 1944 *Metropolitan Life*, that that "rule was adopted for the purpose of permitting organization on a statewide or employerwide basis, which did not develop as anticipated."

The court then examined some of the unit determinations made by the Board since *Quaker City*[11] (327 F. 2d at 908-909):

> "In subsequent cases a majority of the Board, with the same two members dissenting, certified as appropriate units consisting of nine of Metropolitan's district offices in the Cleveland, Ohio, metropolitan area (six offices in the City and three suburban offices eight or nine miles distant), *Metropolitan Life Ins. Co.*, 138 NLRB 512 (1962) [unfair labor practice decision, 141 NLRB No. 96 (1963)] *on appeal to Sixth Circuit*, Case No. 15366; two of Metropolitan's three district offices in Delaware, *Metropolitan Life Ins. Co.*, 138 NLRB 565 (1962) [unfair labor practice decision, 141 NLRB No. 37 (1963)] *on appeal to Third Circuit*, Case No. 14390, 328 F. 2d 820. Metropolitan's single district office in Sioux City, Iowa, together with two detached offices under its administrative control in Fargo, North Dakota, and Sioux Falls, South Dakota, 284 and 120 miles distant, respectively, from Sioux City, *Metropolitan Life Ins. Co.*, 138 NLRB 734 (1962); and all of Metropolitan's district offices within the political limits of the City of Chicago, thereby excluding suburban offices even though six of the thirty-three city district offices had territories extending beyond the city limits and three of the fourteen suburban offices had territories extending into the city. *Metropolitan Life Ins. Co.*, 144 NLRB No. 15 (1963). In *Equitable Life Ins. Co.*, 138 NLRB 529 (1962), the Board determined ap-

[11] The order directing Quaker City to bargain in a single district office unit (138 NLRB 61) had by then already been enforced by the Fourth Circuit (319 F. 2d 690), Judge Boreman dissenting on the ground that extent of organization had controlled the Board decision.

propriate a unit consisting of two district offices in Cleveland, Ohio, with a detached office in Lorain, Ohio, 28 miles away. And in this case the Board majority relying on prior decisions determined that one district office out of eight in a small densely populated state constituted an appropriate bargaining unit. The two dissenting members of the Board merely referred to their dissents in the *Quaker City Life Ins. Co.* case and in others in which they had not only reiterated that they saw no reason to depart from the policy established in the *Metropolitan Life* case of 1944, but had said that it appeared to them that the majority's unit determination was based upon the union's extent of organization of the debit agents involved."

The court recognized the broad discretion vested in the Board in unit determination cases but acknowledged its duty not to "overlook or ignore an evasion by the Board of the command laid upon it by §9(*c*)(5)." Turning to the Board's purported justification for its decision in the specific case before it, the court held that: "the criterion of location in a separate and distinct geographical area is not a criterion consistently applied by the Board as its decisions in Metropolitan's Cleveland and Chicago cases cited herein above clearly demonstrate" (327 F. 2d at 909).

After examining closely the Board's Cleveland and Chicago decisions, it noted (327 F. 2d at 910):

> "Why there should be a community of interest among Metropolitan's agents working from both city and suburban offices in Cleveland but no community of interest among its agents working in both city and suburban offices in Chicago is not explained by the Board majority and is beyond our comprehension.

"The Board majority in this case did not discuss what weight, if any, it gave to the factor of extent of union organization. Nor indeed has the majority done so in any of its decisions since *Quaker City*.

"Looking at its actions, however, we have not found a single instance since *Quaker City* wherein the majority of the Board refused the debit insurance agent unit petitioned for by the Union. We would not consider this fact alone decisive for we would hesitate to assume that the Board was subservient to the Union. Yet we believe this fact is entitled to considerable weight in the light of the testimony of the Union's vice-president in Metropolitan's Cleveland case, *supra*, which was incorporated by stipulation in the record in the instant case, that if the Union did not succeed in organizing on a broader basis it would as a matter of policy petition for a unit 'on a district basis.'"

Finally, the court held (327 F. 2d at 910-911):

"In the absence of any statement by the Board majority of any other rational basis for its varying unit determinations, we can only conclude that the two member Board minority is correct in its charge that the majority has indeed reverted to its pre-1944 policy of regarding the extent of union organization as controlling in violation of §9(c)(5) of the Act."

In so holding, the court realistically applied the Board's purported geographical yardstick against its actual unit determinations in the companion cases. That test revealed that geography was serving the Board merely as an excuse to permit extent of organization to control decision in each case.

The court's determination to look behind the words of a Board decision to find its true rationale is not unprecedented. To have done otherwise would have been nothing more than blind subservience to the kind of expertise that has already been characterized by this Court as a potential "monster":

> "Expert discretion is the lifeblood of the administrative process, but 'unless we [the Court] make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' [citing cases] . . . 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.'." *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 167 (1962). See also *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94 (1942); *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197 (1941); *Northeast Airlines, Inc.* v. *C. A. B.*, 331 F. 2d 579, 586 (1st Cir. 1964).

In the name of expertise, the Board majority has again been guilty of the charge leveled against it by the House Committee when it said that the Board "pretends to find reasons other than the extent to which the employees have organized as grounds for holding such units to be appropriate", *supra*, p. 19.

The court below correctly saw through that pretense and refused to enforce the Board's order.

POINT II

The inconsistent application of the Board's new geographic coherence doctrine irrefutably proves that extent of organization controlled its decision here. The single district office cannot be justified as an appropriate unit under traditional criteria and the Board's *post hoc* efforts to supplement the rationale of its unit determinations are without merit.

The Board's efforts, in its brief to this Court and in its *post hoc* decision in *Metropolitan Life (Meriden and New London)*, to support its decision in this case by reference to "traditional criteria" are simply not borne out by Board precedents either in the insurance industry or in any other industry. The argument, made below for the first time, that the district office is the "analogue of the single manufacturing plant" is also unable to survive comparison with earlier Board decisions (Sub-point 1, *infra*).

The doctrine of "geographic coherence", applied to the insurance business for the first time in *Quaker City*, becomes a transparent pretense when considered in the light of the geographical facts in the various cases in which the units found appropriate coincided exactly with the extent of the union's organization (Sub-point 2, *infra*).

Section 9(c)(5) denounces as unlawful the determination of an appropriate unit by treating extent of organization as controlling. If some theory other than extent of organization could now be discovered to support the unit found, a determination which runs afoul of the subsection would still not be saved. There is, therefore, no merit in the Board's suggestion that Section 9(c)(5) is violated only when the unit determination is based *solely* on the extent of organization (Sub-point 3, *infra*).

1. a. *The criteria traditionally applied by the Board do not support the single district office unit.*—We have already called attention to the fact that, before 1961, the only cases in which the Board ever found a single district insurance office to be an appropriate bargaining unit were those decided before 1944, avowedly because of extent of organization.

We are now told that such a unit can be justified by "traditional criteria", and this makes it relevant to inquire what in fact were the traditional criteria by which the Board, before *Quaker City*, determined appropriate units in the insurance and other industries. Such inquiry need go no further than the two brief paragraphs from the concurring opinion of Board Member Fanning in *The Life Insurance Company of Virginia*, which we have quoted, *supra*, pp. 21-22.

In his succinct summary of the applicable rules, Member Fanning said that the criteria of appropriateness traditionally applied to units in retail establishments should also be applied to insurance agents. He listed these as: the administrative structure of the employer's operations, geographical separation, centralization of operations, interchange of personnel, and uniform wages, duties and working conditions, citing, by way of example, *Father & Son Shoe Stores, Inc.*, 117 NLRB 1479 (1957).

He was unable to square the single district office with these criteria because such a unit did not conform to the administrative division of the *employer's organization*, because the *employer's operations* were highly centralized, and because the wages, duties and working conditions throughout the *employer's organization* were uniform as far as possible.

It cannot be contended that the facts in this case are in any material way different from those that existed in 1959

in *The Life Insurance Company of Virginia* case. In fact, as we have already pointed out (*supra*, pp. 7, 16), there are no material differences in these respects among any of the insurance agent representation cases that have come before the Board since its creation.

The newfound Board pretext that the district office is "in effect a separate administrative entity" does violence to the meaning of that term as it had always been used by the Board in other cases. An "administrative entity" has always been defined by the Board as an administrative division of the employer's organization exercising effective supervisory authority over a group of smaller units within such a division, particularly with respect to labor relations, personnel, sales and advertising policies and decisions with respect to such matters as hiring, promotion, discharge, wage rates and employee benefits.

The *Father & Son* case (cited by Board Member Fanning), *Safeway Stores, Inc.*, 96 NLRB 998 (1951), and *Paxton Wholesale Grocery Co.*, 123 NLRB 316 (1959), are examples of the application of this principle to retail stores. Despite the fact that in each of those cases each individual store was headed by a manager, who had no less authority than did the district manager in this case, the unit determination in each case was governed by the employer's administrative groupings and not, as the Board would have it here, by the lowest common denominator of managerial authority.

As the Board said in *Safeway Stores* (96 NLRB at 1000-1):

> "The Board has frequently indicated that, absent unusual circumstances, the appropriate collective bargaining unit in the retail grocery trade should embrace all employees within the categories sought who perform

their work within the Employer's administrative division or area. There are no 'unusual circumstances' which would justify a contrary finding here. Although there is a substantial geographical separation of the Employer's retail outlets within its Waco District, it is clear that that factor does not present a barrier either to the successful functioning of the Employer's administrative organization or to an expression of the employees' unity of interests. We believe, therefore, that a unit comprising all meat department employees within the Employer's Waco District might well be appropriate."

The Company's administrative division, known as the New England Territory, consists of the district offices located in a group of contiguous states. The territory is under the direction of a Superintendent of Agencies who is the effective supervisory executive of all of the district offices within the territory. He is charged with the administration and effective control of recruitment, training, appraisal, appointment, transfer, promotion, demotion, retirement, abolishment of offices and business and sales promotion activities for each of the district offices. He is charged with the responsibility of having the agents and the manager of each district office conform to the policies and procedures promulgated both by himself and the home office. Control over all labor relations and personnel policies is highly centralized; compensation, employee benefits, duties and working conditions of all agents are uniform throughout the Company.

In the face of this extremely high degree of centralization, the Board found the district office appropriate based on the manager's purported authority. The authority relied on is that the manager is a supervisor, that, although he has no authority to hire or fire, he may recommend

(not always effectively) new hires, that he can accept an agent's resignation, that he explains Company directives and that he may make recommendations (not followed in most cases) concerning termination. These so-called reasons add up to nothing more than that the manager executes at the district office the directives of the Superintendent of Agencies.

Such a niggling search for miniscule indicia of "authority" cannot now serve as an adequate substitute for "traditional criteria".

b. *The district office is not an "analogue of the single manufacturing plant".*—Board counsel, for the first time in the court of appeals suggest as a reason for reversal, a theory never adverted to by the Board in any of its insurance decisions to this day. They say (brief pp. 18-19) that the single manufacturing plant "is the basic component of a manufacturing enterprise", that a plant unit would be valid under Section 9(b) of the Act, and that the district office is an equally valid unit because it is "the insurance industry's analogue" of the single plant.

Leaving aside the serious question whether counsel may thus ask the courts to accept their *"post hoc* rationalizations for agency action" (*Burlington Truck Lines Company, Inc.* v. *United States, supra,* 371 U. S. at p. 168), it is entirely clear that the plant unit principle has no relevance in the insurance industry.

Even in manufacturing plant cases, the Board has not certified a single plant of a multi-plant company where there was centralized control, uniformity of wages and working conditions and the other elements, which, as we have shown, have traditionally precluded single office or store units.

In industries other than insurance, the Board itself has dismissed a petition for a single plant unit when the true basis for certification of the unit would have been extent of organization; *Murray Corporation of America,* 101 NLRB 313 (1952). And the use by the House Committee of *New England Silk* in support of Section 9(c)(5), as we have pointed out (*supra,* pp. 24-25), is itself persuasive authority in support of our contention that the single plant unit cannot be employed to disguise the fact that extent of organization was the controlling factor which brought about the decision in this case.

In the *Murray Corporation* case, *supra,* the union had sought a unit of office and clerical employees at the company's plant in Ecorse, Michigan. The company took the position that the only appropriate unit was a combination of its two plants in that state located 14 miles apart. The Board, dismissing the petition as based on extent of organization, said (pp. 314-5):

> "The Ecorse plant, the only plant involved, in this proceeding, is located 14 miles from the Main plant. The two plants manufacture different products and have different plant managers. Both, however, are under the jurisdiction of the vice president in charge of the automotive division. Purchasing and general accounting for both are handled at the Main plant, and labor relations policies for both are established there.
>
> The Ecorse plant hires its own office and clerical employees. However, the evaluation, administration, and control of salaries for both plants are determined at the Main plant, and all salaried payrolls are prepared there. Classifications, with one exception, are the same at both plants; and employees in the same classifications have similar duties, skills, and rates of pay. Transfers from one plant to the other are made from

> time to time. All salaried employees have the same rights and privileges. Although there is no settled grievance procedure for these employees, problems relating to them, if not settled at the plant level, ultimately clear through the director of industrial relations, located at the Main plant."

To the same effect, see *Briggs Manufacturing Co.*, 101 NLRB 284 (1952), *Farrington Manufacturing Co.*, 87 NLRB 1051 (1949), *C. Pappas Company, Inc.*, 80 NLRB 1272 (1948), *Westbrook Enterprises, Inc.*, 79 NLRB 1032 (1948).

Thus, even if the manufacturing plant unit could be considered a proper "analogue" to the single district office, the latter would still not survive the test of Section 9(c)(5).

2. *The lack of consistency in application of the Board's purported "geographic coherence" criteria exposes extent of organization as the true reason for its decisions.*—In Appendix A to this brief, we list scores of cases in which, following *Quaker City*, the Board has found appropriate the unit sought by the union and the unit coinciding in each case with extent of organization. Recognizing its burden to reconcile these decisions, the Board says that "there is a reasonable degree of geographic coherence among the offices" grouped, because "the offices are not too distant and their territories are either adjacent or in reasonable proximity to one another" (Brief, p. 19).

A study of the cases discloses, however, that no such "coherence" is to be found. In the words of the court below, this "is not a criterion consistently applied by the Board" (327 F. 2d at 909).

For example, whereas in this case the Board refused to include in the unit an office located 12 miles away, in *Metropolitan Life Insurance Co.* (*Sioux City*), 138 NLRB 734

(1962), "detached offices" located in other states at distances 120 and 284 miles away were included in the unit.[12]

In *Metropolitan Life Insurance Co. (Cleveland)*, 138 NLRB 512 (1962), enforced 330 F. 2d 62 (6th Cir. 1964), pending on petition for writ of certiorari, No. 229, this Term, and in *Metropolitan Life Insurance Co. (Detroit)*, 146 NLRB 184 (1964), the Board appeared to be adopting a metropolitan area concept, including in single units both urban and suburban offices in each of these cities. Yet in Detroit, the Board reached out 30 miles to include a suburban office and 57 miles to include a detached office. In Cleveland, some city offices were as far as 16 miles from each other and the distance between two suburban offices was 18 miles.

The metropolitan area concept was entirely discarded, however, in *Metropolitan Life Insurance Co. (Chicago)*, 144 NLRB 149 (1963), where the control exercised by extent of organization was most flagrant. There, the Regional Director, assuming from the Board's decisions that a cohesive metropolitan area unit was proper, included both urban and suburban offices. The Board reversed, explaining that in Chicago, unlike Cleveland and Detroit, it would rely "upon the physical location of the individual offices (within the city) as the yardstick in determining the geographic appropriateness of the unit" (144 NLRB at 151).

Totally ignored was the fact that, in Chicago, some urban district offices had territories extending into the suburbs and that some suburban offices had territories extending

[12] A detached office, under the immediate supervision of an assistant manager, contains a group of agents who report to this office rather than to the district office. Contact between the detached office and the district office from which it is detached is "occasional" (R. 48a-49a) and obviously less frequent than the directives issued directly to the detached office by the Superintendent of Agencies.

into the city. Also ignored was the fact that one excluded suburban office was only six blocks away from an included urban office.

Later, at the Union's request, in three separate cases (Appendix A, Nos. 20, 23, and 41), three separate Chicago suburban district offices were found to be appropriate for bargaining in three separate units.

In another example, the Board approved a state-wide consent election in Massachusetts (Appendix A, No. 2), thus holding that even in 1962 a state-wide unit of insurance agents did not "contravene . . . established Board policy" (NLRB Annual Report, 1961, p. 55).

Respondent will, at the argument of this case, offer to the Court a tabulation listing the distance of the district office closest to each Metropolitan Life district office which has been found appropriate as a separate bargaining unit. The tabulation will reveal that in ten of those instances the unit found was within five miles from another district office not included in the unit.

In each of the foregoing cases in which the Board decision was reported, the Board majority states a purported rationale, never mentioning extent of organization, although in each case the unit found matches precisely the extent to which the employees have been organized. Not until after the decision of the court below in this case did the Board ever make any effort to explain its strange silence on the issue of extent of organization. This was the central issue before it and the heart of all the two-member dissents.

In giving the Union precisely what it asked for in this case, the Board took pains to note that "no union [was] seeking a larger unit" (R. 15a) and, judging from the results reached in the cases cited above, it seems fair to assume that, had this or any other union sought a larger unit, a larger unit would have been granted. That a request by

the Company for such a larger unit is always rejected shows that extent of organization has been treated as controlling and that in each of the cited cases, the Board has attempted to accomplish precisely what Congress forbade in Section 9(c)(5).

3. *The correct test of the applicability of Section 9(c)(5).*—By its statement on page 14 of its brief that Section 9(c)(5) "was merely intended to preclude the Board from basing its unit determination *solely*[13] on extent of organization in the absence of other criteria of appropriateness", the Board seems to be saying that even when extent of organization is treated as controlling, its decision should still stand if other factors can be found to support the unit determination made. Such an approach emasculates Section 9(c)(5) and renders sacrosanct any Board determination which could have survived attack, absent the enactment of the subsection.

The Board's argument overlooks the legislative history of Section 9(c)(5) which shows that it was the intent of Congress that: "While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight . . . "

Far from abiding by the clear Congressional intent that extent of organization must be given only little weight, the Board admittedly has been satisfied with whatever geographic coherence it could find to support the unit requested by the Union. Its brief here concedes (p. 19) that this was the process of decision by its statement that the Union's request has been granted whenever the offices sought to be included "are not too distant" from one another.

In short, "geographic coherence" exists in every case in which the Union groups more than one office in its petition

[13] Emphasis added.

for a unit. It disappears at the very point at which extent of organization ends.

The Board will, of course, never announce that it has treated extent of organization as controlling. When, however, its conduct renders inescapable the conclusion that it has done so, its determination must be set aside notwithstanding that a similar determination might have survived attack if extent of organization had not been treated as controlling. This was the holding in *Singer Sewing Machine Co.* v. *N. L. R. B.*, 329 F. 2d 200, 205 (4th Cir. 1964), where the court said that where

> "extent of organization was the controlling factor in the unit determination, . . . it would be no answer to the invalidity of an order having such a basis that the other factors which we have discussed in this opinion would support the unit determination which was made."

To the same effect, *N. L. R. B.* v. *Glen Raven Knitting Mills*, 235 F. 2d 413, 416 (4th Cir. 1956).

When this Court has considered the facts in this case in the context of the decisions the Board has been rendering over the last few years in closely related cases, we believe it will have no choice but to arrive at the conclusion that extent of organization has been treated as controlling in this and in the other cases. Having reached that conclusion, it will have no choice but to decline Board counsel's invitation to roam through the record seeking isolated facts to justify the conclusion the Board reached.

The fact that extent of organization was treated as controlling will alone compel it to approve the result reached by the court below.

The decree should be affirmed.

Respectfully submitted,

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APPENDIX A

Chronological List of Insurance Industry Cases Since *Quaker City*

In the following tabulation, the unit found appropriate in every case was the unit petitioned for by the Union. Each petition sought a unit exactly coextensive with the Union's extent of organization (see 327 F. 2d at 910 citing the testimony of Union's Vice President, R. 333a-334a). In every case the petitioner was the same Union, Insurance Workers International Union, AFL-CIO.

Location	Unit Found Appropriate	Company	Citation
1. Alexandria, Va.	Single district office in Alexandria	Quaker City Life Ins. Co.	134 NLRB 960 (1961, Representation Case), 138 NLRB 61 (1962, Unfair Labor Practice Case), enforced NLRB v. Quaker City Life Ins. Co., 319 F. 2d 690 (4th Cir. 1963).
2. State of Mass.	Entire state	Metropolitan Life Ins. Co.	Case No. 1-RC-6965 (1962, unreported).
3. Cleveland, Ohio	6 urban and 3 suburban offices consisting of metropolitan Cleveland	Metropolitan Life Ins. Co.	138 NLRB 512 (1962, Representation Case), 141 NLRB 1074 (1963, Unfair Labor Practice Case), enforced Metropolitan Life Ins. Co. v. NLRB, 330 F. 2d 62 (6th Cir. 1964) pending on petition for writ of certiorari, No. 229 this term.

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Location	Unit Found Appropriate	Company	Citation
4. Cleveland, Ohio	2 district offices located in Cleveland	Equitable Life Ins. Co.	138 NLRB 529 (1962, Representation Case), 141 NLRB 718 (1963, Unfair Labor Practice Case).
5. Wilmington, Delaware.	2 out of 3 offices in the State of Delaware, the 2 both in Wilmington area	Metropolitan Life Ins. Co.	138 NLRB 565 (Representation Case), 141 NLRB 337 (1963, Unfair Labor Practice Case), enforced Metropolitan Life Ins. Co. v. NLRB, 338 F. 2d 820 (2d Cir. 1964) pending on petition for writ of certiorari No. 56 this term.
6. Sioux City, Iowa	1 district office in Sioux City and 2 detached offices, one in Fargo, North Dakota, 284 miles away, the other in Sioux Falls, South Dakota, 120 miles away.	Metropolitan Life Ins. Co.	138 NLRB 734 (1962, Representation Case), 142 NLRB 28 (1963, Unfair Labor Practice Case).
7. Pittsburgh, Pa.	2 separate units for 2 single district offices out of 5 offices located in the Pittsburgh metropolitan area	The Western and Southern Life Ins. Co.	138 NLRB 538 (1962, Representation Case), 142 NLRB 28 (1963, Unfair Labor Practice Case).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Company	Citation
8. Detroit, Michigan	8 urban and 9 suburban district offices located in metropolitan Detroit	Metropolitan Life Ins. Co.	Case No. 7-RC-5269 (1962, Representation Case unreported), 146 NLRB No. 184 (1964 Unfair Labor Practice Case).
9. Providence, R. I.	single district office located in a suburb of Providence, Rhode Island	Metropolitan Life Ins. Co.	Instant case.
10. Johnstown, Pa.	single district office	Knights Life Ins. Co.	Case No 6-RC-3187 (1962, Representation Case unreported).
11. Philadelphia, Pa.	single district office	Superior Life Ins. Co.	Case No. 4-RC-5115 (1962, Representation Case unreported).
12. State of Oklahoma	entire state	Farmers Insurance Group	143 NLRB 240 (1963, Representation Case).
13. Baltimore, Maryland	single district office	American Industrial Life Ins. Co.	Case No. 5-RC-4347 (1963, Representation Case unreported).
14. Petersburg, Va.	single district office	The Life Insurance Company of Virginia	Case No. 5-RC-3974 (1963, Representation Case unreported), 143 NLRB 1343 (1963, Unfair Labor Practice Case).
15. Chicago, Illinois	33 district offices located within the city limits of Chicago excluding 14 suburban offices	Metropolitan Life Ins. Co.	144 NLRB 1 (1963, Representation Case), 146 NLRB No. 116 (1964, Unfair Labor Practice Case).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Company	Citation
16. Toledo, Ohio	3 district offices located in Toledo	Metropolitan Life Ins. Co.	Case No. 13-RC-9130 (1963, Representation Case unreported), 146 NLRB No. 113 (1963, Unfair Labor Practice Case).
17. Meriden, Conn.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7313 (1963, Representation Case unreported), 147 NLRB No. 8 (1963, Unfair Labor Practice Case).
18. New London, Conn.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7331 (1963, Representation Case unreported), 147 NLRB No. 8 (1963, Unfair Labor Practice Case).
19. Olean, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3120 (1963, Representation Case unreported).
20. Chicago, Illinois	single district office in a suburb of Chicago (Chicago Heights)	Metropolitan Life Ins. Co.	Case No. 13-RC-9768 (1963, Representation Case unreported), 148 NLRB No. 145 (1964, Unfair Labor Practice Case).
21. Holyoke, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7730 (1963, Representation Case unreported).
22. Alton, Illinois	single district office	Metropolitan Life Ins. Co.	Case No. 14-RC-4792 (1964, Representation Case unreported).
23. Chicago, Illinois	single district office located in suburb of Chicago (Joliet)	Metropolitan Life Ins. Co.	Case No. 13-RC-9960 (1964, Representation Case unreported).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Company	Citation
24. Richmond, Virginia	single district office	Durham Life Insurance Co.	Case No. 5-RC-4398 (1964, Representation Case unreported).
25. Amsterdam, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3526 (1964, Representation Case unreported).
26. Buffalo, New York	single district office	The Colonial Life Insurance Company of America	Case No. 3-RC-3342 (1964, Representation Case unreported).
27. Belleville, Illinois	single district office	Metropolitan Life Ins. Co.	Case No. 14-RC-4998 (1964, Representation Case unreported).
28. Cleveland, Ohio	two district offices	American Life & Accident Ins. Co. of Kentucky	Case No. 8-RC-5456 (1964, Representation Case unreported).
29. Beverly, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-8161 (1964, Representation Case unreported).
30. Bridgeport, Conn.	two district offices	Metropolitan Life Ins. Co.	Case No. 2-RC-13741 (1964, Representation Case unreported).
31. West Hartford, Conn.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-8041 (1964, Representation Case unreported).
32. Cohoes, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3461 (1964, Representation Case unreported).
33. Richmond, Virginia	city wide	Union Life Insurance Co.	Case No. 5-RC-4768 (1964, Representation Case unreported).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Comp	Citation
34. E. St. Louis, Illinois	single district office	Metropolitan Life Ins. Co.	Case No. 14-RC-4963 (1964, Representation Case unreported).
35. Everett, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-8063 (1964, Representation Case unreported).
36. Gloversville, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3512 (1964, Representation Case unreported).
37. Hammond, Ind.	single district office	Metropolitan Life Ins. Co.	Case No. 13-RC-10427 (1964, Representation Case unreported).
38. Herkimer, New York	single district office	Metropolitan Life Ins. Co.	Case No. 3-RC-3442 (1964, Representation Case unreported).
39. Lynn, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-8042 (1964, Representation Case unreported).
40. Metropolitan New York	company's administrative division	State Farm Ins. Cos.	Case No. 2-RC-13563 (1964, Representation Case, unreported).
41. Chicago, Illinois	single district office located in a suburb of Chicago (Oak Lawn)	Metropolitan Life Ins. Co.	Case No. 13-RC-10156 (1964, Representation Case unreported).
42. Ottawa, Illinois	single district office	Metropolitan Life Ins. Co.	Case No. 13-RC-10416 (1964, Representation Case unreported).
43. Salem, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7918 (1964, Representation Case unreported).

Chronological List of Insurance Industry Cases Since Quaker City

Location	Unit Found Appropriate	Company	Citation
44. Sommerville, Mass.	single district office	Metropolitan Life Ins. Co.	Case No. 1-RC-7930 (1964, Representation Case unreported).
45. Warren, Ohio	single district office	Metropolitan Life Ins. Co.	Case No. 8-RC-5755 (1964, Representation Case unreported).
46. Youngstown, Ohio	two district offices	Metropolitan Life Ins. Co.	Case No. 8-RC-5724 (1964, Representation Case unreported).